

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 3, 2009 Session

ROSE M. DARNELL (CARTER) v. JEREMY W. DARNELL

**Appeal from the Circuit Court for Rutherford County
No. 51538 J. Mark Rogers, Judge**

No. M2009-00429-COA-R3-CV - Filed November 30, 2009

The mother appeals the trial court's decision to revise the parenting arrangement to allow the father Wednesday night residential time. Finding that mother petitioned the court alleging a change in circumstances and that the parties amended the parenting plan by agreement, we agree with the trial court that a material change in circumstances had been established under Tenn. Code Ann. § 36-6-102(a)(2)(C). Accordingly, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Stephen W. Pate, Murfreesboro, Tennessee, for the appellant, Rose M. Darnell (Carter).

R. Wilford Fraley, III, Murfreesboro, Tennessee, for the appellee, Jeremy W. Darnell.

MEMORANDUM OPINION¹

The narrow issue on appeal is whether the trial court erred by revising the parties' Permanent Parenting Plan to give father residential time with the child on Wednesday nights.

Rose Darnell and Jeremy Darnell married in 2001 and had one child born in 2002. The parties divorced in June of 2005 incorporating their Marital Dissolution Agreement and Parenting

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Plan into their final decree. Their child had not yet begun kindergarten or school at the time of the divorce.

In 2007, Ms. Darnell filed a petition asking that the court modify Mr. Darnell's child support obligations when the child began kindergarten. Ms. Darnell later amended her petition alleging material change in circumstances requiring amendments to the Parenting Plan. Mr. Darnell then filed a counter petition also arguing that there had been a material change in circumstances necessitating further amendments to the Parenting Plan.

Fortunately, the parties were able to reach agreement on the majority of the changes they claim were needed to their Parenting Plan. This agreement of the parties is reflected in an Agreed Order dated February of 2009 with an attached revised Parenting Plan. The only dispute that was heard and decided by the trial court was whether the parties' prior agreement should be revised so that Mr. Darnell had his daughter every Wednesday night.

On the single contested issue between the parties, the trial court found that it was in the child's best interest to reside with Mr. Darnell on Wednesday nights. Ms. Darnell appeals.

ANALYSIS

Ms. Darnell argues the amendment to the Parenting Plan allowing Mr. Darnell Wednesday night with their daughter was in error since there had been no material change in circumstances and, alternatively, because to do so was not in the child's best interest.

The parties agree that Tenn. Code Ann. § 36-6-102(a)(2)(C) governs revision of their residential parenting schedule. It provides as follows:

(C) If the issue before the court is a modification of the court's prior decree pertaining to a residential parenting schedule, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

We find under this particular set of facts that both Ms. Darnell and Mr. Darnell have acknowledged in their pleadings before the trial court that a material change of circumstances had occurred. Consequently, since both parties agreed that their circumstances had materially changed, the trial court did not err in finding a material change of circumstances. Even without the parties'

concession, we agree with the trial court that the parties agreeing to revise the Parenting Plan was sufficient to establish a material change in circumstances.

Finally, Ms. Darnell argues that revising the schedule to allow Father to have residential time with their daughter is not in the child's best interest. According to Ms. Darnell, this schedule "could affect her academically." Because of the broad discretion given trial courts in matters of child custody, visitation, and related issues, including change in circumstances and best interests, and because of the fact specific nature of such decisions, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Caldwell v. Hill*, 250 S.W.3d 865, (Tenn. Ct. App. 2007); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). Accordingly, this court will decline to disturb a parenting arrangement fashioned by a trial court unless that decision is an abuse of discretion *i.e.* is based on the application of incorrect legal principles, is unsupported by a preponderance of the evidence, or is against logic or reasoning. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). We cannot find that the trial court erred.

While Ms. Darnell's appeal was unsuccessful, we do not find an award of attorney's fees is appropriate. Consequently, Ms. Darnell's request for attorney's fees under Tenn. Code Ann. § 36-5-103(c) is denied.

The trial court is affirmed. Costs of this appeal are taxed against Rose M. Darnell (Carter) against whom execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.